FILED
FEB 23 1956
HAROLD B. WILLEY, C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 603

IN THE MATTER OF THE APPLICATION

*of*

ENNIO DUCCI,

Petitioner,

THE COMMISSIONER OF PATENTS,

Respondent.

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

## POINT I

### Respondent's Authority is Not Controlling

The respondent relies on *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. In order for a case to be controlling it must have the same law applied to the same facts. The *Postum* case relates to a different law, and different facts.

It was an appeal, not a petition for a writ of certiorari;

It was a trade mark case under the Law of 1920, not a patent case under the Law of 1952;

It dealt with a failure of Congress to reinact the enabling provisions of the Act of 1905, which allowed an

appeal to this Court, and did not relate to a new enabling statute which enables this Court to take jurisdiction by writ of certiorari;

The Supreme Court made its decision in the *Postum* case on the grounds that the Postum Company had a complete remedy in the District and Circuit courts. They said: "Neither the opinion nor decision of the Court of Appeals under 4914 RS or Section 9 of the Act of 1905 precludes any person interested from having the right to contest the validity of such patent or trade mark in any court where it may be called in question." In that case, the decision was predicated on the proposition that the petitioner was not left without a remedy. In the present case, the petitioner is without a remedy unless this Court takes jurisdiction.

## POINT II

### This Proceeding is a Case in the Constitutional Sense

The decision below is not a mere confirmation of an administrative act. It goes beyond the scope of administrative acts and construes, defines, and limits a statute in such a way as to deny the rights provided by the statute. That is a judicial and not an administrative act. That is a case in the constitutional sense.

The ultimate construction of the patent act statutes have a greater importance in the life of this country than ever before. This decision puts the Court of Customs and Patent Appeals in a position to legislate in patent matters, by striking down or adding to any part of the law with which it disagrees. It has acted in the present instance to strike down a part of the Law of 1952.

The Court of Customs and Patent Appeals is not a legislative body; its organic act does not give it the right to legislate. It is proceeding to legislate without authority.

This Court in *Keller* v. *Potomac Electric Co.*, 261 U. S. 440, defined the subjects of legislative and judicial power in the following terms: "Has it the power—to review the exercise of discretion by the commission and itself raise or lower valuations • • •. If it has, then the Court is to exercise legislative power in that it will be laying down new rules to change present conditions and to guide future action, and is not confined to the definition and protection of existing rights". In the present case, the Court has changed present conditions by adding requirements to the statute, as explained in our petition. It has done this without right or authority. It presumes to change the law. That is a judicial act, a case, not a mere review of an administrative decision.

## POINT III

## 28 U. S. C. 1256

This section was not in the prior law. It is an added statute which enables this Court to hear any case it chooses to entertain whether customs or patent.

There is no logic to the separation of the customs decisions from the patent decisions of that Court. If one can be heard, so also the other.

The respondent's brief states: "Prior to that codification the only statutory provision authorizing this Court to review decisions of the Court of Customs and Patent Appeals was a provision relating to customs cases" (page 5). Thereafter, the brief inserts the following self-contradiction: "The codification of Title 28 merely separated the foregoing two provisions • • •."

The section being admittedly new, is not merely a separated part of the prior customs law.

If the present decision is allowed to stand, the Court of Customs and Patent Appeals will be able to reconstruct the patent law according to its own whim, adding to or subtracting from the statute law as it sees fit.

It is not wise to allow any court such power.

Respectfully submitted,

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